(5)

Supreme Court, U.S.
FILED
DEC 23 1999
CLERK

No. 98-2060

# IN THE SUPREME COURT OF THE UNITED STATES

RONALD D. EDWARDS, WARDEN,
*Petitioner,*

*v.*

ROBERT W. CARPENTER,
*Respondent.*

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

## JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: JUNE 22, 1999
CERTIORARI GRANTED: NOVEMBER 8, 1999

69 pp

BEST AVAILABLE COPY

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NOTICE

Because of poor print quality on some copies of the printed appendix to the petition for a writ of certiorari, we have reprinted here the four items that were included in that earlier appendix. All references in the parties' briefs on the merits to pages of the appendix refer to this appendix rather than the appendix to the petition.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

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No. 96-CV-447

ROBERT W. CARPENTER, PLAINTIFF

*v.*

GARY C. MOHR, RESPONDENT

---

**DOCKET ENTRIES**

| DATE | DOCKET NUMBERS | PROCEEDINGS |
|---|---|---|
| 5/3/96 | 1 | PETITION FOR WRIT OF HABEAS CORPUS (referred to Mag. Judge Norah M. King) (no pgs: 6) (wh) [Entry date 05/07/96] |

* * * * *





| DATE | DOCKET NUMBERS | PROCEEDINGS |
|---|---|---|
| 6/19/96 | 5 | RETURN OF WRIT by respondent to habeas corpus petition [1-1] (treated as mtn to dismiss) (no pgs: 15 + exhibits) (wh) [Entry date 06/20/96] |
| 6/21/96 | 6 | TRANSCRIPT filed of state court proceedings #88CR-10-3707 (1 vol) (wh) [Entry date 06/24/96] |

* * * * *

| | | |
|---|---|---|
| 9/26/96 | 9 | Traverse by plaintiff to motion to dismiss (return of writ) [5-1] (wh) [Entry date 09/27/96] |
| 3/12/97 | 10 | OPINION AND ORDER: by Judge Joseph P. Kinneary Sr. granting habeas corpus petition [1-1] as to pet 2nd claim for relief unless w/in 90 days Ohio Court of Appeals reinstates pet direct appeal and dismissing case (cc: all counsel) (no pgs: 20) (wh) |

| DATE | DOCKET NUMBERS | PROCEEDINGS |
|---|---|---|
| 3/12/97 | 11 | JUDGMENT: dismissing case (cc: all counsel) (no pgs: 1) (wh) |
| 4/9/97 | 12 | NOTICE OF APPEAL by respondent Gary C. Mohr from Dist. Court decision [11-1] of 3/12/97 ( no pgs: 2) (sm) [Entry date 04/10/97] |
| 4/9/97 | 13 | MOTION by respondent to stay judgment (no pgs: 5) (wh) [Entry date 04/10/97] |
| | | * * * * * |
| 4/21/97 | 15 | NOTICE OF CROSS APPEAL by plaintiff Robert W Carpenter from Dist. Court decision [11-1] of 3/12/97 ( no pgs: 2) (sm) [Entry date 04/23/97] |
| | | * * * * * |



| DATE | DOCKET NUMBERS | PROCEEDINGS |
|---|---|---|
| 6/4/97 | 17 | ORDER by Judge Joseph P. Kinneary Sr. granting motion for certificate of appealability [16-1], - granting motion to stay judgment [13-1] pending review of judgment by USCA 6th (cc: all counsel) (no pgs: 2) (wh) |
| | | * * * * * |
| 5/18/99 | 25 | ORDER by Mag. Judge Norah M. King –pet to articulate position re inconsistency between mandate of USCA & footnote 11 of that court's opinion by 5/24/99 (cc: all counsel) (no pgs: 1) (wh) |

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

Nos. 97-3392/3393

ROBERT W. CARPENTER,
Petitioner-Appellee/Cross-Appellant,

*v.*

GARY C. MOHR, WARDEN,
Respondent-Appellant/Cross-Appellee.

---

**DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| 4/23/97 | Prisoner Case Docketed with certificate of appealability pending in District Court. Notice filed by Appellant Gary Mohr. Notice filed by Appellee Cross-Appellant Robert W. Carpenter. Transcript needed: n (Respondent (State) filed Notice NOA; Petitioner filed cross appeal) (nb) [97-3392] (Habeas was granted and first NOA was filed by respondent) (nb) [97-3393] |

* * * *



| DATE | PROCEEDINGS |
|---|---|
| 6/3/97 | FIRST PROOF BRIEF filed by Jon C. Walden for Appellant Cross-Appellee Gary Mohr. Certificate of Service date 6/2/97. Number of Pages: 26. [97-3392, 97-3393] (vf) [97-3392 97-3393] |

* * * *

| | |
|---|---|
| 7/14/97 | PROOF BRIEF filed by Dennis C. Belli for Appellee Cross-Appellant Robert W. Carpenter. Copies: 1. Certificate of Service date 7/11/97. Number of Pages: 29. [97-3392, 97-3393] (vf) [97-3392 97-3393] |

* * * *

| | |
|---|---|
| 8/12/97 | THIRD PROOF BRIEF filed by Jon C. Walden for Appellant Cross-Appellee Gary Mohr. Certificate of service date 8/11/97. Number of Pages: 9. [97-3392, 97-3393] (vf) [97-3392 97-3393] |

* * * *

| DATE | PROCEEDINGS |
|---|---|
| 4/28/98 | CAUSE ARGUED on 4/28/98 by Charles L. Wille for Appellant Cross-Appellee Gary Mohr in 97-3393, Dennis C. Belli for Appellee Cross-Appellant Robert W. Carpenter in 97-3393 before Judges Merritt, Jones, Norris. [97-3393] (paw) [97-3393] |
| 12/18/98 | OPINION filed: AFFIRMED the district court's judgment that the ineffective assistance of Carpenter's appellate counsel constituted cause for the procedural default of his insufficiency of the evidence claim, but REMAND the case to the district court for the imposition of a remedy consistent with this opinion. Respondent's direct appeal is rendered moot, decision for publication pursuant to local rule 24 [97-3392, 97-3393]. Gilbert S. Merritt, Circuit Judge, Nathaniel R. Jones, Authoring Judge, Alan E. Norris, Circuit Judge. (nb) [97-3392 97-3393] |
| 12/18/98 | JUDGMENT: AFFIRMED REMANDED – (nb) [97-3392 97-3393] |

* * * *



| DATE | PROCEEDINGS |
|---|---|
| 1/4/99 | PETITION for en banc rehearing filed by Charles L. Wille for Appellant Cross-Appellee Gary Mohr. Certificate of service date 1/4/99. [97-3392, 97-3393] (blh) |

* * * *

| | |
|---|---|
| 3/24/99 | ORDER filed denying petition for en banc rehearing [1865483-1] filed by Charles L. Wille [97-3392, 97-3393]. |
| 4/1/99 | MANDATE ISSUED with no cost taxed [97-3392, 97-3393] (vf) [97-3392 97-3393] |

COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

| | | |
|---|---|---|
| State of Ohio, | : | January Term, 1990 |
| | : | |
| Plaintiff, | : | Case No. 88CR-10-3707 |
| | : | |
| vs. | : | Indictment: Aggravated |
| | : | Murder with Specification |
| Robert William Carpenter, | : | (R.C. 2903.01); |
| | : | (Aggravated Robbery |
| Defendant. | : | (R.C. 2911.01) (1 count); |
| | : | (Total 2 counts) |

[Filed: June 7, 1990]

OPINION
AND
FINDINGS OF FACT

This matter is before the Panel following Robert Carpenter's plea of guilty of one count of Aggravated Murder with death penalty specifications and one count of Aggravated Robbery.

Pursuant to Ohio Revised Code §2929.03(F), the panel is required to set forth the specific findings of which the mitigating factors set forth in division (B) of the Ohio Revised Code §2929.04 it found to exist, what aggravating circumstances the offender was found guilty of committing, and whether or not it found the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt.



STATEMENT OF FACTS

On or about October 5, 1988, the defendant, Robert Carpenter went to the residence of Thelma Young, a 73-year-old woman, whom the defendant knew very well. Mrs. Young would hardly admit anyone to her home, but knew the defendant well enough to let him enter her home. While there, the defendant bludgeoned the victim with a blunt object and repeatedly cut and stabbed her with a sharp object and screw driver.

The victim kept cash in her purse and a larger amount of reserve cash in her dresser. All of the cash was missing and not found by the police.

The defendant was subsequently arrested, claiming that two Cubans and a black man kidnapped him and forced him to go to the victim's residence where they killed Mrs. Young. No evidence was found or presented by the State corroborating defendant's story that three other men were involved in the murder.

The case came before the three-judge panel on March 29, 1990. At that time, the defendant waived in open court and in writing his right to a jury trial, consenting instead to be tried by the three-judge Panel; also at this time the defendant waived his rights pursuant to a written plea of guilty form and an extensive written plea agreement, both of which were signed by himself, his lawyers and the prosecuting attorneys and explained in detail to him by the Panel. He plead guilty to both counts in the indictment.

In rendering this opinion, the Panel has considered the evidence presented at the plea and mitigation stages, the psychiatric testimony admitted by way of mitigation. Arguments by counsel were waived.

## AGGRAVATING CIRCUMSTANCES

The Panel finds the defendant has plead guilty to the following aggravating circumstances:

1. In compliance with §2941.14 of the Ohio Revised Code, the Grand Jurors further find Specification One to the First Count, under section 2929.04(A)(7) of the Ohio Revised Code, that the offense at bar was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit Aggravated Robbery, and the offender was the principal offender in the commission of the aggravated murder.

## MITIGATING FACTORS

Ohio Revised Code [§]2929.04(B) sets forth seven factors that shall be considered in mitigation. The Panel is required to determine which facts listed in §2929.04(B), supra, exist, if any. The Panel's findings as to those facts are as follows:

1. Whether the victim of the offense induced or facilitated it; not a mitigating factor.

2. Whether it is unlikely the offense would have been committed but for the fact the offender was under duress, coercion or strong procation; not a mitigating factor.

3. Whether at the time of committing the offense the offender because of a mental illness or defect lacked substantial capacity to appreciate the criminality of his conduct or to conform this



conduct to requirement of law; not a mitigating factor.

4. The youth of the offender; not a mitigating factor.

5. The offender's lack of significant history of prior criminal convictions and delinquency of judication; a mitigating factor which will be discussed below.

6. If the offender was a participant in the offense but not the principal offender, the degree of offender's participation in the offense and degree of offender's participation in the acts that lead to the death of the victims; not a mitigating factor.

7. Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

In considering paragraph 7 of §2929.04, supra, the following factors were found to exist:

1. The defendant had a trouble free child and adulthood up to about 30 years of age;

2. The defendant, at about age 30, began abusing crack cocaine, and this abuse may have been a contributing factor to his conduct on the date in question;

3. The defendant suffered from chronic depression and sever episodic depression, most likely exacerbated by the abuse of crack cocaine;

4. The defendant's family was caring and supportive but encouraged the defendant to avoid the additional risk of going to trial in this case;

5. The victim's family concurred in the written plea agreement;

6. That the ultimate sentence of life imprisonment with no possibility of parole for thirty (30) years will in all probability result in the defendant's demise in prison.

The nature and circumstances of the events surrounding Thelma Young's death are clear to the Panel. The Panel will not reiterate each and every fact of October 5, 1986 between the hours of 8:30 and 10:00 o'clock p.m., preferring to leave the details of the transcript to speak. The salient facts, however, are clear that Thelma Young was found in her home by her son Warren Young shortly after 10:00 o'clock p.m. on the 5th of October, 1988.

The victim had been bludgeoned several times by a blunt instrument, cut in several different places about her head and body by a sharp cutting instrument and stabbed multiple times with a screwdriver. The victim kept cash in her purse for daily needs, as well as reserve cash in her dresser. No cash was found at the scene by the police.

The only person present during the killing was the defendant, and he is the only one who could tell what happened to Mrs. Young. Some of these facts came to the Panel through the psychological



testimony of two psychologists, both of whom testified about their interview with the defendant, who admitted that he stabbed the victim several times with a screw driver.

The history, character and background of the defendant presents a picture that weighs heavily in the mitigation determination. The mitigating evidence demonstrates that the defendant had a rather uninvolved childhood. Although his biological parents divorced when he was quite young, he was raised by an industrious father who provided essentially for the defendant's basic needs. The psychological testimony did indicate that the defendant developed early on feelings of inadequacy due to his perceptions of his stepfather's treatment of him, as well as other forces contributing to his feelings of inadequacy. Nevertheless, the defendant developed normally, avoided adolescent criminal behavior and moved into manhood uneventfully. Most of the mitigating testimony by family, friends, wife and child painted a sketch of a man who was devoted to his family, provided for their economic and emotional welfare and was basically a good man, never given to violence or criminality. While the defendant was barely literate when he left high school, he taught himself to functionally read and write and led a limited, but otherwise seemingly happy life.

Then, at about the age of 30, the defendant began abusing crack cocaine at different times, resulting in several hospitalizations due to deep episodic depression. Both psychologists testified that he was chronically depressed which most likely was exacerbated by the abuse of cocaine. Although his

psychological tests revealed about average intelligence, he began deteriorating psychologically with the abuse of cocaine, reducing his ability to maintain steady employment. In essence, the defendant was an average citizen, crime free all his life until he came under the ravages of cocaine, resulting in the only crime with which he has ever been charged, aggravated murder. Other than these few minutes, the defendant has been a loyal, hardworking and productive person.

The Panel, however, in considering all of the factors involved, additionally weighed the desire of those concerned to eliminate the trauma and necessity of the trial.

The Panel also weighed heavily the fact that he most likely will never offend again, due to his age at the time of his eligibility for parole, even if he lives that long.

It is, therefore, the judgment of the Panel that in weighing all of the factors of mitigation against the aggravating circumstances, the Panel cannot find beyond a reasonable doubt that the aggravated circumstances outweigh the mitigating circumstances.

The judgment of the Panel is that the defendant be sentenced as to Count One to life imprisonment with no possibility of parole for a full thirty (30) years in the ORIENT CORRECTIONAL FACILITY; and to ten (10) years minimum to twenty-five (25) years maximum in the ORIENT CORRECTIONAL FACILITY as to Count Two.



These two sentences are to run concurrently. Jail time credit shall be 589 days through May 17, 1990. Additional jail time credit shall be granted to the defendant while awaiting transfer to the Department of Rehabilitation and Correction.

/s/ TOMMY L. THOMPSON
Tommy L. Thompson, Chairman

/s/ DAVID CAIN
David Cain, Judge

/s/ C. HOWARD JOHNSON
C. Howard Johnson, Judge

Copies to:

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Franklin County Prosecutor
Attn: Daniel Hogan
Tim Mitchell

Gerald Simmons

James Kura
Franklin County Public Defender
Attn: Mary Younger

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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No. 90AP-803
(Regular Calendar)

STATE OF OHIO, Plaintiff-Appellee,

*v.*

ROBERT CARPENTER, Defendant-Appellant.

[Filed: September 29, 1994]

MEMORANDUM DECISION

ON MOTION

YOUNG, J.

Defendant-appellant, Robert Carpenter, has filed a *pro se* application for reopening of this court's decision in *State v. Carpenter* (Mar. 12, 1991), Franklin App. No. 90AP-803, unreported (1991 Opinions 1032) pursuant to App.R. 26(B). In that decision, journalized on March 12, 1991, this court affirmed the judgment of the Franklin County Court of Common Pleas finding defendant guilty of aggravated robbery and aggravated murder.

The history of this case is as follows: appellant was indicted by the Franklin County Grand Jury for one count of aggravated murder with penalty specifications and one count of aggravated robbery. The aggravated murder count alleged that, on October 5, 1988, appellant purposely caused the death of Thelma Young while committing the offense of aggravated robbery.

Appellant waived his right to a jury trial and agreed to have the case tried before a three-judge panel. In order to avoid a trial, appellant followed a procedure upheld in *North Carolina*



*v. Alford* (1970), 400 U.S. 25, and entered a guilty plea, although he maintained his innocence. The guilty plea was accepted by the court after a recitation of facts by the prosecution. Both the prosecution and the defense then presented witnesses at a mitigation hearing and, on May 21, 1990, the trial court imposed a sentence of life with the possibility of parole only after serving thirty years. The court also imposed a concurrent sentence of ten to twenty full years on the aggravated robbery charge.

In his first appeal to this court, appellant argued that the appropriate sentence should have been life with the possibility of parole after twenty, as opposed to thirty full years. This court affirmed the trial court's sentence.

In his application for reopening, appellant argues that his appellate counsel was ineffective, for failure to raise the sufficiency of the evidence as an assignment of error in his initial appeal. Pursuant to App.R. 26(B), a criminal defendant may raise a claim of ineffective assistance of appellate counsel by applying to reopen his direct appeal. Under the rule, an application for reopening must be filed "within ninety days from journalization of the appellate judgment."

The appellate judgment in this case was journalized on March 12, 1991, prior to the effective date of App.R. 26(B), July 1, 1993. In similar cases where the appellate judgment has been journalized prior to July 1, 1993, this court has essentially treated this ninety-day period as running from the effective date of App.R. 26(B). See *State v. Courtright* (Aug. 9, 1994), Franklin App. No. 86AP-34, unreported; *State v. Carpenter* (Aug. 11, 1994), Franklin app. No. 88AP-1181, unreported. Clearly, appellant's motion for reopening was filed more than ninety days after the effective day of July 1, 1993, and a much longer time after the Supreme Court's decision in *State v. Murnahan* (1992), 63 Ohio St.3d 60, the predecessor to App.R. 26(B).

An application for reopening filed outside the ninety-day time limit should be denied unless the appellant can show good cause for filing at a later time. App.R. 26(B)(2)(b). Appellant asserts that he has shown good cause because he was not aware that he could raise an assignment of error directed to the sufficiency of the evidence.

A review of the transcript demonstrates that appellant waived his right to a jury trial and agreed to have the case heard by a three-judge panel. In addition, appellant sought to avoid a trial and, therefore, entered a guilty plea. The court questioned appellant extensively to ascertain that appellant's waiver of a jury trial, and his entering of a guilty plea, were done knowingly and voluntarily. In fact, the trial court refused to accept appellant's guilty plea, until the prosecution went forth with its proffer of the facts. The trial court explained that the prosecution had to demonstrate facts that touched all the essential elements of the crime charged in the indictment. Then, and only then, did the trial court believe it was empowered to accept appellant's plea. Appellant's counsel agreed with this approach.

Appellant's counsel further stipulated to the recitation of the facts as proffered by the state for purposes of the mitigation hearing. In *State v. Post* (1987), 32 Ohio St.3d 380, the Ohio Supreme Court stated in pertinent part:

> "Agreements, waivers and stipulations made by the accused, or by the accused's counsel in his presence, during the course of a criminal trial are binding and enforceable. See *State v. Robbins* (1964), 176 Ohio St. 362, 27 O.O.2d 312, 199 N.E.2d 742, paragraph two of the syllabus. Although R.C. 2945.06 requires the court to 'examine the witnesses' in determining whether the accused is guilty of aggravated murder, we find that appellant was bound by the agreed-upon procedure wherein the state would proffer a statement of facts in lieu of witnesses or other evidence." *Id.* at 393.

Accordingly, we find that appellant has failed to set forth any showing of good cause for filing beyond the ninety-day period required by App.R. 26(B)(1). If appellant was prejudiced by ineffective assistance of counsel in 1990, this fact should have



been known to him by the time the Supreme Court decided *Murnahan, supra*, in 1992, and even more so by the effective date of App.R. 26(B). Appellant has therefore failed to show good cause for his delay in filing more than ninety days after the effective date of App.R. 26(B). Thus, appellant's application for reopening is denied.

*Motion denied.*

PETREE and CLOSE, JJ., concur.

IN THE SUPREME COURT OF OHIO

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No. 95-1129

STATE OF OHIO, Appellee,

*v.*

CARPENTER, Appellant.

[Submitted: Oct. 24, 1995]

[Decided: Jan. 31, 1996]

Appellant, Robert Carpenter, was convicted of aggravated murder and aggravated robbery and was sentenced to concurrent terms of imprisonment of thirty years to life and ten to twenty years, respectively. He appealed, and his convictions were affirmed. *State v. Carpenter* (Mar. 12, 1991), Franklin App. No. 90AP-803, unreported, 1991 WL 35009.

In 1994, appellant filed an application to reopen his direct appeal under App.R. 26(B), claiming ineffective assistance of appellate counsel. As good cause for failing to file within ninety days of journalization of the judgment sought to be reopened, as required by App.R. 26(B)(2)(b), appellant stated that he was unaware he could raise an assignment of error related to sufficiency of the evidence. The court of appeals found that this reason did not constitute good cause, and appellant appealed its decision to this court.



Michael Miller, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, for appellee.

Dennis C. Belli, Columbus, for appellant.

PER CURIAM.

The judgment of the court of appeals is affirmed on authority of *State v. Reddick* (1995), 72 Ohio St.3d 88, 647 N.E.2d 784.

Judgment affirmed.

MOYER, C.J., and DOUGLAS, WRIGHT, RESNICK, FRANCIS E. SWEENEY, SR., PFEIFER and COOK, JJ., concur.

PETITION UNDER 28 U.S.C. §2254
FOR WRIT OF HABEAS CORPUS BY A PERSON
IN STATE CUSTODY

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

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No. 96-CV-447

ROBERT W. CARPENTER, PLAINTIFF

*v.*

GARY C. MOHR, RESPONDENT

[Filed May 3, 1996]

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**United States District Court** District: S.D. Ohio, E.D.

Name: Robert W. Carpenter Prisoner No: 226-931

Place of Confinement:
Orient Correctional Reception Center
P.O. Box 300
Orient, Ohio 43146

| Name of Petitioner (include name under which convicted): | | Name of Respondent (authorized person having custody of petitioner): |
|---|---|---|
| Robert W. Carpenter | v. | Gary C. Mohr, Warden |



The Attorney General of the State of: Ohio
30 East Broad Street, Columbus, Ohio 43215

**PETITION**

1. Name and location of court which entered the judgment of conviction under attack: Franklin County Court of Common Pleas, 369 South High Street, Columbus, Ohio 43215

2. Date of judgment of conviction July 7, 1990

3. Length of sentence a life sentence and a concurrent sentence of 10 to 25 years imprisonment

4. Nature of offense involved (all counts) count one: aggravated murder, Ohio Rev. Code §2903.01, with specifications, count two: aggravated robbery, Ohio Rev. Code §2911.01

5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☒
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   ---

   ---

6. If you pleaded not guilty, what kind of trial did you have (Check one) N/A
   (a) Jury ☐
   (b) Judge only ☐

7. Did you testify at the trial? N/A
   Yes ☐ No ☐
8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐
9. If you did appeal, answer the following:
   (a) Name of court Ohio Tenth District Court of Appeals

   (b) Result judgment affirmed

   (c) Date of result and citation, if known State v. Carpenter (Mar. 12, 1991), Franklin App. No. 90AP-803, unreported

   (d) Grounds raised the sentence imposed by the trial court is excessive and contrary to the evidence and the law.

   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:
   (1) Name of court _____
   (2) Result _____
   (3) Date of result and citation, if known _____
   (4) Grounds raised _____

   (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:
   (1) Name of court _____
   (2) Result _____
   (3) Date of result and citation, if known _____
   (4) Grounds raised _____



10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court Ohio Tenth District Court of Appeals
    (2) Nature of proceeding application for reopening of appeal
    (3) Grounds raised the judgment of the court of common pleas finding petitioner guilty of aggravated murder and a principal offender specification is not supported by sufficient evidence, and is against the manifest weight of the evidence; petitioner was denied the effective assistance of appellate counsel
    (4) Did you receive an evidentiary hearing on your petition, application or motion?
    Yes ☐ No ☒
    (5) Result application denied

    (6) Date of result April 24, 1995

    (b) As to any second petition, application or motion give the same information:
    (1) Name of court _____
    (2) Nature of proceeding _____
    (3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion:
Yes ☐ No ☒
(5) Result _____
(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☒ No ☐
(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____
_____
_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.



Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge of the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: The State of Ohio failed to produce sufficient evidence to support petitioner's conviction for aggravated murder and a principal offender specification, in violation of his rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Supporting FACTS (state *briefly* without citing cases or law) Following petitioner's Alford plea to the offense of aggravated murder with a principal offender specification, the State failed to produce competent credible evidence during the culpability hearing that he participated in a purposeful killing of the homicide victim and that he was the principal offender. The Ohio statute

and procedural rule relating to the acceptance of a guilty plea to aggravated murder impose a duty on the prosecution to prove the material elements of the offense beyond a reasonable doubt.

B. Ground two: Petitioner was denied the effective assistance of counsel in his direct appeal from his conviction, in violation of his rights under the Sixth Amendment to the U.S. Constitution.

Supporting FACTS state *briefly* without citing cases or law): In his direct appeal from his conviction, petitioner's appointed counsel failed to raise an assignment of error directed to the sufficiency of the evidence necessary to support his conviction for aggravated murder with a principal offender specification. The failure to raise this issue deprived petitioner of competent counsel guaranteed to him by the Constitution, and resulted in prejudice to him.

C. Ground three: Petitioner was denied a meaningful opportunity to raise the issue of ineffective assistance of appellate counsel in the state courts, in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Supporting FACTS (state *briefly* without citing cases or law): The state appellate courts arbitrarily rejected petitioner's attempts to reopen his appeal to raise the sufficiency of the evidence issue. The Ohio courts routinely apply the "good cause" exception the ninety day time limit to reopen an appellate judgment in such a manner that "good cause" is never found. As a result, petitioner and others are denied any meaningful opportunity to have their appellate claims heard on the merits.

D. Ground four: _____

_____

Supporting FACTS (state *briefly* without citing cases or law): _____



13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
    (a) At preliminary hearing None held
    (b) At arraignment and plea Gerald G. Simmons, 1243 South High Street, Columbus, Ohio 43206; Mary Younger, 373 South High Street, Columbus, Ohio 43215
    (c) At trial None held
    (d) At sentencing Same as listed in 15(b) above.
    (e) On appeal Allen Adair, 373 South High Street, Columbus, Ohio 43215
    (f) If any post-conviction proceeding Dennis C. Belli, 844 South Front Street, Columbus, Ohio 43206
    (g) On appeal from any adverse ruling in a post-conviction proceeding same as listed in 15(b) above

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
    Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
    Yes ☐ No ☒
    (a) If so, give name and location of court which imposed sentence to be served in the future: _____
    _____
    (b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

/s/ DENNIS C. BELLI
Signature of Attorney (if any)
Dennis C. Belli (0025216)
844 South Front Street
Columbus, Ohio 43206

I declare under penalty of perjury that the foregoing is true and correct. Executed on

4-30-96
(date)

Sworn & Subscribed before me
this April 30, 1996.
/s/ GLENNADINE M. HESS
Glennadine M. Hess
Notary Public
My Commission Expires July 7, 1996
Recorded in Pickaway County

/s/ ROBERT W. CARPENTER
Signature of Petitioner



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

---

No. C-2-96-447

ROBERT CARPENTER, Petitioner

*v.*

GARY MOHR, WARDEN, Respondent.

[Filed: March 12, 1997]

OPINION AND ORDER

Petitioner, a state prisoner, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the instant petition, Respondent's return of writ, Petitioner's traverse, and the exhibits of the parties.

On October 14, 1989, Petitioner was indicted by the Franklin County Grand Jury for one count of aggravated murder, with a death penalty specification, and one count of aggravated robbery. Represented by two attorneys, Petitioner entered *Alford* pleas to both counts on March 29, 1990, whereafter a mitigation hearing was held to determine Petitioner's sentence. Petitioner received a life sentence for the aggravated murder, and a concurrent ten (10) to twenty-five (25) year sentence for the aggravated robbery.

Represented by an assistant Franklin County public defender, Petitioner appealed to the Court of Appeals for the Tenth Appellate District. He raised the following assignment of error:

> The evidence offered at the mitigation hearing was such that the three judge panel could only reasonably conclude that the appropriate sentence was life with the possibility of parole after twenty full years of imprisonment.

On March 12, 1991, the Court of Appeals affirmed the judgment of the trial court. It does not appear from the record that Petitioner appealed the Court of Appeals' decision to the Supreme Court of Ohio.

However, on March 13, 1992, Petitioner filed a *pro se* post-conviction action in the trial court. He raised the following issues for review:

1. Ineffective Counsel,
2. Improper charging or offenses, and improper sentences imposed;
3. Illegal plea of guilty obtained by coercion, and inappropriate information and improper dialogue with the court pursuant to Rule 11; and
4. Constitutional violations.

On June 18, 1992, the trial court dismissed Petitioner's action on the ground that he had "shown no substantive grounds for relief."

Petitioner filed a *pro se* appeal to the Court of Appeals for the Tenth Appellate District, and raised the following assignments of error:



1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING APPELLANT'S PETITION TO VACATE OR SET ASIDE JUDGEMENT (sic) OF CONVICTION IN NOT GRANTING AN EVIDENTIARY HEARING AS REQUIRED BY REVISED CODE § 2953.21(E), IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF THE LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.
2. THE TRIAL COURT ERRED IN NOT ORDERING THE CLERK TO CONVEY REQUESTED DOCUMENTS TO APPELLANT.

Thereafter, counsel was appointed to assist Petitioner with his appeal. Counsel filed an additional brief on September 30, 1992, wherein he raised the following argument.

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY SUMMARILY DISMISSING APPELLANT'S PETITIONS FOR POST CONVICTION RELIEF UNDER OHIO REVISED CODE § 2953.21 (C) AND (E).

On December 3, 1992, the Court of Appeals affirmed the judgment of the trial court on the ground that "[t]he petition filed by defendant is insufficient to state a claim for post-conviction relief under R.C. 2953.21."

Petitioner then filed a *pro se* appeal to the Supreme Court of Ohio. He raised two propositions of law:

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING APPELLANT'S PETITION TO VACATE OR SET ASIDE JUDGMENT (sic) OF CONVICTION IN NOT GRANTING AN EVIDENTIARY HEARING AS REQUIRED BY

REVISED CODE § 2953.21(E), IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF THE LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

2. THE TRIAL COURT ERRED IN NOT ORDERING THE CLERK TO CONVEY REQUESTED DOCUMENTS TO APPELLANT.

On April 14, 1993, the Supreme Court of Ohio dismissed Petitioner's appeal.

Represented by new counsel, Petitioner filed an application in the Court of Appeals to reopen his direct appeal on the basis of ineffective assistance of appellate counsel. Petitioner's new attorney assigned as error appellate counsel's failure to raise the following issue:

THE JUDGMENT OF THE THREE-JUDGE PANEL OF THE COURT OF COMMON PLEA FINDING DEFENDANT-APPELLANT GUILTY OF AGGRAVATED MURDER AND A SPECIFICATION THAT HE WAS THE PRINCIPAL OFFENDER IS NOT SUPPORTED BY SUFFICIENT COMPETENT EVIDENCE ESTABLISHING ALL THE ELEMENTS OF THE OFFENSE AND THE SPECIFICATION, AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

On September 29, 1994, the Court of Appeals denied Petitioner's request to reopen his direct appeal on the basis of Petitioner's failure to show good cause why he could not have filed the motion within the ninety-day period required by Ohio R. App. P. 26(B)(1).

Petitioner sought leave to appeal to the Supreme court of Ohio. On June 14, 1995, the Supreme Court accepted



jurisdiction, and set deadlines for the filing of merit briefs. Petitioner raised the following propositions of law:

1. The applicability of the good cause exception to the ninety day time period for the filing of an application to reopen an appeal in a criminal case under App. R. 26(B)(1) must be evaluated by balancing the interests under the facts of a particular case so as to give effect to the overriding concern that a defendant have a meaningful opportunity required by the due process cause of the fifth and fourteenth amendments to the federal constitution to challenge his conviction.

2. In balancing the interests of the parties and evaluating the defendant's showing of good cause for the filing of an application for reopening after the ninety day time period has expired, the court of appeals must consider whether the defendant possessed actual knowledge during the ninety day period of the existence of the grounds for appeal not raised by his appellate counsel, or had reason to question the constitutionality of his conviction on grounds not raised by his appellate counsel. The court of appeals must also consider whether it was appellate counsel's own deficient performance that resulted in the reopening at an earlier time, or whether defendant deliberately by-passed the orderly procedures in the rules of appellate procedure.

3. In balancing the interests of the parties and evaluating the defendant's showing of good cause for the filing of an application for reopening after the ninety day time period has expired, the court of appeals must consider the effect that the passage of time between the journalization of the appellate judgment of the appellate judgment and the filing of the application for reopening will have on the state's ability to defend against

defendant's challenge. The absence of material prejudice to the state weights in favor of a finding of good cause.

On January 31, 1996, the Supreme Court of Ohio affirmed the Court of Appeals' decision without opinion.

This federal habeas corpus action ensued. Petitioner seeks a writ of habeas corpus based on the following claims for relief:

Ground One: The State of Ohio failed to produce sufficient evidence to support Petitioner's conviction for aggravated murder and a principal offender specification, in violation of his rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Supporting Facts: Following Petitioner's *Alford* plea to the offense of aggravated murder with a principal offender specification, the State failed to produce competent credible evidence during the culpability hearing that he participated in a purposeful killing of the homicide victim and that he was the principal offender. The Ohio statute and procedural rule relating to the acceptance of a guilty plea to aggravated murder impose a duty on the prosecution to prove the material elements of the offense beyond a reasonable doubt.

Ground Two: Petitioner was denied the effective assistance of counsel in his direct appeal



from his conviction, in violation of his rights under the Sixth Amendment to the U.S. Constitution.

Supporting Facts: In his direct appeal from his conviction, Petitioner's appointed counsel failed to raise an assignment of error directed to the sufficiency of the evidence necessary to support his conviction for aggravated murder with a principal offender specification. The failure to raise this issue deprived Petitioner of competent counsel guaranteed to him by the Constitution, and resulted in prejudice to him.

Ground Three: Petitioner was denied a meaningful opportunity to raise the issue of ineffective assistance of appellate counsel in the state courts, in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Supporting Facts: The state appellate courts arbitrarily rejected Petitioner's attempts to reopen his appeal to raise the sufficiency of the evidence issue. The Ohio courts routinely apply the "good cause" exception [to] the ninety day time limit to reopen an appellate judgment in such a manner that "good cause" is never found. As a result, Petitioner and others are denied any meaningful opportunity to have their appellate claims heard on the merits.

Respondent argues in the first instance that Petitioner's first and second claims are procedurally barred. Respondent argues in the alternative that all of Petitioner's claims lack merit. The Court will first address Respondent's argument that Petitioner's first and second claims are procedurally barred.

## I.

In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants, and in order to prevent needless friction between the state and federal courts, a state criminal defendant with federal constitutional claims is required fairly to present those claims to the highest court of the state for consideration. 28 U.S.C. § 2254(b), (c). If he fails to do so, but still has an avenue open to him by which he may present the claims, his petition is subject to dismissal for failure to exhaust state remedies. *Id.*; *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). But if, because of procedural default, the petitioner can no longer present his claims to a state court, he has also waived them for purposes of federal habeas review unless he can demonstrate cause for the procedural default and actual prejudice from the alleged constitutional error. *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

In the Sixth Circuit, a four-part analysis must be undertaken when the state argues that a federal habeas claim is precluded by the petitioner's failure to observe a state procedural rule. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). "First, the court must determine that there is a procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Id.* Second, the Court must determine whether the state courts actually enforced the state procedural sanction. *Id.* Third, it must be decided whether the



state procedural forfeiture is an adequate and independent state ground upon which the state can rely to foreclose review of a federal constitutional claim. *Id.* Finally, if the Court has determined that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Id.*.

The first part of the *Maupin* test requires the Court to determine whether Petitioner violated a procedural rule. The failure to raise a claim on direct appeal that appears on the face of the record constitutes a procedural default under Ohio's doctrine of *res judicata*. *See State v. Cole*, 2 Ohio St. 3d 112 (1982); *State v. Perry*, 10 Ohio St. 2d 175 (1967). In the instant case, Petitioner's first claim for relief, *i.e.*, that the State failed to produce sufficient evidence of Petitioner's guilt, addresses an alleged error which would appear on the face of the record. Accordingly, Petitioner's failure to raise this claim on direct appeal constitutes a procedural default under Ohio's doctrine of *res judicata*.

The state courts were never given an opportunity to enforce the procedural rule in this instance due to the nature of Petitioner's procedural default. Consequently, the Court deems the second part of *Maupin* test to have been satisfied.

The Court further finds that the procedural rule is an adequate and independent state ground upon which to deny relief. The doctrine of *res judicata* is stated in unmistakable terms in numerous Ohio decisions, and Ohio courts have consistently refused to review claims on the merits under that doctrine. *See State v. Cole*, 2 Ohio St. 3d 112 (1982); *State v. Ishmail*, 67 Ohio St. 2d 16 (1981); *State v. Perry*, 10 Ohio St. 2d 175 (1967). Further, the doctrine of *res judicata* serves the

state's interests in finality, and in ensuring that claims are adjudicated at the earliest possible opportunity.

The Court having found that Petitioner's first claim for relief is subject to a procedural default, and that this procedural rule provides an adequate and independent ground for denying relief, it is incumbent upon Petitioner to demonstrate both cause for his procedural default, and actual prejudice resulting from the alleged error. As cause for the failure to raise his sufficiency of the evidence claim on direct appeal, Petitioner asserts ineffective assistance of appellate counsel. Given that "[a] federal court may not consider ineffective assistance of counsel as cause for a procedural default unless the ineffectiveness claim was itself presented to the state courts as an independent claim," this Court must first determine whether Petitioner's ineffective assistance of appellate counsel claim has been preserved for federal habeas corpus review.

## II.

Applying the *Maupin* analysis therefore, this Court must first determine whether a procedural rule applies to Petitioner's claim, and if so, whether Petitioner violated that rule. In Ohio, claims of ineffective assistance of appellate counsel must be raised in an application to reopen the direct appeal within ninety days of the Court of Appeals' judgment entry. *State v. Murnahan*, 63 Ohio St. 3d 60 (1992); Ohio R. App. P. 26(B). Untimely applications may be filed only by leave of the court of appeals upon a showing of good cause for the delay[1] Petitioner filed an application to reopen his direct appeal on the basis of ineffective assistance of appellate counsel on July 15,

[1] In *State v. Reddick*, 72 Ohio St. 3d 88 (1995), the Supreme Court of Ohio held that the 90-day limit and good cause exception imposed by the July 1, 1993 amendment to Ohio R. App. P. should apply to cases which predated that amendment.



1994. In an effort to comply with the Ohio R. App. P. 26(B), Petitioner alleged as cause for his failure to file this application within the allotted time period that he had relied on appellate counsel's expertise, and was himself unaware at the time of his direct appeal that his attorney could have raised a sufficiency of the evidence claim following his guilty plea. The Court of Appeals rejected this allegation, and dismissed Petitioner's application for the failure to show cause for the untimely filing. The Supreme Court of Ohio affirmed the Court of Appeals' decision. Thus, the first and second parts of the *Maupin* test would appear to be satisfied.

The third part of the *Maupin* test requires this Court to determine whether the state procedural rule is an adequate and independent ground for precluding relief. To be "independent," the procedural rule at issue, as well as the state court's reliance thereon, must rely in no part on federal law. *See Coleman v. Thompson*, 501 U.S. 722, 732-33 (1991). To be adequate, the state procedural rule must be firmly established and regularly followed by the state courts. *Ford v. Georgia*, 498 U.S. 411 (1991). "[O]nly a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." *Id.* at 423 (quoting *James v. Kentucky*, 466 U.S. 341, 348-351 (1984); *see also Barr v. City of Columbia* 378 U.S. 146, 149 (1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964). It is difficult, in light of the foregoing, for this Court to find that the procedural rule in this case was "firmly established and regularly followed" by the state courts at the time that Petitioner filed his delayed motion for reconsideration.

A review of Ohio appellate court decisions reveals that at the time that Petitioner filed his application, there are was no firmly established state procedure for enforcing the "good cause" requirement for applications that were not filed within

the ninety day period. For instance, it appears that some Ohio appellate courts apply a standard under which "good cause" will almost never be found. *See State v. Owens*, 1996 WL 146097, No. 84 C.A. 131 (Ohio App. Dist. 7 Mar. 29, 1996). Other Ohio appellate courts employ a standard under which "good cause" will almost always be found. *See State v. Nitenson*, 1994 WL 679894, No. 91 C.A. 796 (Ohio App. Dist. 4 Feb. 24, 1994). Still other Ohio appellate courts appear to avoid the "good cause" issue, and proceed instead to the merits of the applicant's claim(s). *See State v. Holland*, 1994 WL 142735, No. 92AP-853 (Ohio App,. Dist. 10 Apr. 21, 1994).

The Supreme Court of Ohio has offered little guidance. This Court could not find a single appeal wherein the Supreme Court of Ohio found "good cause" for the untimely filing of an application for delayed reconsideration brought pursuant to Ohio R. App. P. 26(B). In *State v. White*, 72 Ohio St. 3d 91, 92-93 (1995), the applicant sought review by the Ohio Supreme Court of the Court of Appeals' decision that the applicant had failed to show good cause for the untimely filing of his applicant for reconsideration. The applicant's attorney, an Assistant Ohio Public Defender, had attached an affidavit to the application explaining that he had been unable to file the application sooner due to his heavy workload, and that the defendant was in no way responsible for the delay. The Ohio Supreme court affirmed the Court of Appeals' determination that the explanation did not suffice as "good cause." Justice Wright dissented from the decision, stating that "I must respectfully dissent because I believe that this court should not take such a rigid attitude toward standards that will suffice for 'good cause.'" *Id.* at 92. Justice Wright went on to remark that:

> [A]s for the assertion that lack of counsel does not excuse the untimely application for reopening, the majority places a great deal of faith in the ability of a layperson, within ninety days, to realize that his appellate counsel was



> ineffective, realize why the appellate counsel was ineffective, and understand how to ask the court of appeals to address the ineffectiveness. All this when, in most cases, the indigent incarcerated inmate does not receive the court of appeals' decision from his or her appellate lawyer in a timely fashion, if at all. My word, what a statute!

*Id.* at 93.

In sum, this Court finds that Petitioner's ineffective assistance of appellate counsel claim is not barred by procedural default. As such, Petitioner is not precluded from raising that claim as an individual ground for relief, or as cause for the procedural default of his first claim for relief. In order to suffice as cause for the procedural default of his first claim for relief, the appellate attorney error alleged by Petitioner must rise to the level of an independent constitutional violation. *See Coleman v. Thompson*, 501 U.S. 722 (1991); *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Ritchie v. Eberhart*, 11 F.3d 587 (6th Cir. 1994). That being the case, determining whether Petitioner has established cause for the procedural default applicable to his first claim for relief effectively requires the Court to address the merits of Petitioner's second claim for relief. Accordingly, the Court will address the merits of Petitioner's second claim for relief, *i.e.*, ineffective assistance of appellate counsel, before concluding the *Maupin* analysis of the first claim for relief.

## III.

In his second claim for relief. Petitioner alleges ineffective assistance of appellate counsel. The right to counsel guaranteed by the Sixth Amendment is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 711 n.14 (1970). The standard for reviewing a claim of ineffective assistance of counsel is twofold:

> First, the defendant must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.

*Strickland v. Washington*, 466 U.S. 668, 686 (1984). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

To establish prejudice, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because Petitioner must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance of counsel, should the Court determine that Petitioner has failed to satisfy one prong, it need not consider the other. *Id.* at 697.

The *Strickland* test applies to appellate counsel. *Burger v. Kemp*, 483 U.S. 776 (1987). Counsel on the first appeal as of right must exercise reasonable professional judgment. *Evitts v. Lucey*, 469 U.S. 397 (1985). "[W]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (citing *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). It is not enough for the Petitioner to merely argue that his appellate counsel failed to raise a nonfrivolous claim, for counsel does not have a duty to advance every nonfrivolous argument which is available. However, a petitioner may establish that counsel rendered constitutionally inadequate representation if the petitioner can show that counsel ignored obvious issues of strength, while including those which were clearly and significantly weaker. *Mayo v. Henderson*, 13 F.3d 528, 533 (2nd Cir. 1994). In *Gray v. Greer*, 880 F.2d 644, 646 (7th Cir. 1985), the Seventh Circuit explained:



> When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

*Id.*

In the instant case, Petitioner's attorney on direct appeal raised a single assignment error, *i.e.*, that the trial court had erred in imposing a life sentence instead of a life sentence with the possibility of parole after twenty years. Petitioner contends that any lawyer reasonably knowledgeable of criminal law would have challenged the sufficiency of the evidence supporting Petitioner's conviction for the aggravated murder offense and the accompanying specification. According to Petitioner, at the time his direct appeal was taken, legal precedent existed for challenging the sufficiency of the evidence following a plea of guilty to aggravated murder. Petitioner also argues that at the time of his appeal, legal precedent existed for modification of the degree of homicide on appeal based upon the sufficiency of the evidence adduced during the R.C. § 2945.06 hearing. *State v. Place*, 25 Ohio App. 2d 158 (1971) (modifying the trial court's judgment that the defendant was guilty of murder in the first degree, because there was only sufficient evidence to support a judgment that the defendant was guilty of murder in the second degree.) Under *Strickland*, however, it is not enough for Petitioner merely to assert that counsel neglected to raise a claim that was available. In assessing Petitioner's allegation, this Court must determine—not whether Petitioner's appellate counsel could have challenged the sufficiency of the evidence, or even whether Petitioner's appellate counsel *should* have raised that issue in the sense that it might have been beneficial to Petitioner—but whether the failure of Petitioner's appellate counsel to raise a sufficiency of the evidence claim was so egregious under professional norms governing his field, that he

was not functioning as the advocate guaranteed by the Sixth Amendment to the United States Constitution.

Ordinarily, a defendant may not attack the sufficiency of the evidence following his plea of guilty. *State v. Hertz*, 135 N.E.2d 781 (Ohio App., 10 Dist. 1954). This principle does not apply to defendants who plead guilty to aggravated murder because of the unique statutory provision at R.C. § 2945.06. *State v. Taylor*, 30 Ohio App. 2d 252, 261 (1972). Section 2945.06 of the Ohio Revised Code provides in pertinent part:

> If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly.

Thus, in *State v. Taylor, supra*, the Court of Appeals for Cuyahoga County held that "since the *Hertz* case did not involve a murder case, nor a degree hearing, it can hardly be authority for blocking an appeal from the decision after proceedings under R.C. § 2945.06." *Id.* at 261. Petitioner correctly asserts, therefore, that legal precedent existed at the time of his appeal was taken for challenging the sufficiency of the evidence as to the degree of the offense to which he pleaded guilty. But the inquiry does not end here.

To resolve Petitioner's allegation of ineffective appellate counsel, this Court must determine whether challenging the sufficiency of the evidence under the specific facts of Petitioner's case was such a widely known and utilized practice under the standards governing criminal defense attorneys, that appellate counsel's failure to raise the claim was professionally unreasonable. Two inquires are inherent in this task: (1) whether challenging the sufficiency of the evidence following a plea of guilty to aggravated murder was a standard practice under professional norms; and (2) whether most reasonable criminal defense attorneys would have challenged the sufficiency of the evidence under the facts of Petitioner's case. With respect to the first of these inquiries, a review of Ohio cases involving a plea of guilty or no contest to a charge of aggravated murder reveals that defendants often—though not always, or even most of the time—raise some sort of issue on



appeal surrounding the culpability hearing required under R.C. § 2945.06 and/or the sufficiency of the evidence to support the degree of homicide.[2]

The foregoing suggests to this Court that the practice of challenging on direct appeal the sufficiency of the evidence to support a finding of guilt to a charge of aggravated murder following a guilty plea, while not so widely used as to be "automatic," is nonetheless far from novel. In any event, it is reasonable to conclude that a reasonably knowledgeable criminal defense attorney should at least be familiar with the issue.

As for the second inquiry, the Court finds that the specific facts of Petitioner's case warranted a sufficiency of the evidence challenge on direct appeal. Petitioner had maintained his innocence throughout the proceedings against him, and only entered a guilty plea pursuant to *Alford v. North Carolina*, 400 U.S. 25 (1970), to avoid the potential consequences of going to trial. For that reason, Petitioner refused to adopt the statement of facts proffered by the prosecutor during the R.C. §

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[2] In the following appellate cases, the defendants, following pleas of guilty to aggravated murder, challenged on direct appeal either the sufficiency of the evidence supporting the degree of homicide, or the trial court's alleged deviation from the procedure required under R.C. § 2945.06. *State v. Snyder*, 1996 WL 307268, No. 94 C.A. 2080 (Ohio App. 4 Dist. Jun. 4, 1996); *State v. Burrage*, 1992 WL 174663 No. 1755 (Ohio App. 4 Dist. Jul. 22, 1992); *State v. Korp*, 1989 WL 132127, No. 56132 (Ohio App. 8 Dist. Nov. 2, 1989); *State v. Hedrick* 1988 WL 18767, No. 53422 (Ohio App. 8 Dist. Feb. 18, 1988).

By contrast, the following appellate decisions involved defendants who, after pleading guilty to aggravated murder, did *not* challenge on direct appeal either the sufficiency of the evidence supporting the offense of aggravated murder, or whether the trial court had deviated from the procedures required under R.C. § 2945.06. *State v. Gesser*, 1996 WL 465406, No. 94 C.A. 225 (Ohio App. 7 Dist. Aug. 14, 1996); *State v. Anderson*, 108 Ohio App. 3d 5 (9 Dist. 1995); *State v. Roberson*, 1995 WL 23343 (Ohio App. 8 Dist. Jan. 19, 1995); *State v. Thompson*, 1993 WL 116081, No. CA-9063 (Ohio App. 5 Dist. Apr. 12, 1993); *State v. Stumpf*, 1986 WL 6502, Nos. CA760. CA-793 (Ohio App. May 22, 1986).

2945.06 culpability hearing. (Transcript, at 15-17.) *See State v. Post*, 32 Ohio St. 3d 380, 393-93 (1987) (holding that a statement of facts may satisfy the evidentiary requirement of R.C. § 2945.06, but only where the accused or his counsel has expressly or impliedly waived those procedures.).

Further, the single assignment of error raised by Petitioner's appellate counsel was: "The evidence offered at the mitigation hearing was such that the three judge panel could only reasonably conclude that the appropriate sentence was life with the possibility of parole after twenty fully years of imprisonment." Thus, the entire essence of appellate counsel's brief focused on the appropriateness of the sentence that Petitioner had received, *i.e.*, the extent of Petitioner's culpability. In light of that fact, it is that much more difficult to understand why counsel would not have raised a sufficiency of the evidence challenge with respect to the degree of the offense in addition to—if not in lieu of—a simple challenge of the sentence imposed by the three judge panel following the mitigation hearing. The foregoing strongly suggests that counsel's failure to raise a sufficiency of the evidence challenge was not a tactical decision, but an oversight.

In sum, the Court is persuaded that Petitioner has a made a *prima facie* showing of ineffective assistance of appellate counsel. Petitioner has demonstrated that appellate counsel neglected to raise on appeal an issue of obvious strength, and raised instead a claim which was clearly and significantly weaker. Further, without holding that there was insufficient evidence to support Petitioner's conviction for aggravated murder, the Court notes that the apparent absence in the trial record of any evidence as to the degree of the homicide—and therefore the potential viability of a sufficiency of the evidence challenge on direct appeal—is sufficient to undermine confidence in the outcome of Petitioner's direct appeal. Accordingly, Petitioner's second claim for relief is well taken.

## III.

In his first claim for relief, Petitioner argues that there was insufficient evidence to support his conviction for aggravated murder. Petitioner contends in this third claim for relief that he was denied a meaningful opportunity to present his ineffective



assistance of counsel claim by virtue of the fact that the appellate courts arbitrarily rejected his argument for "good cause," and that Ohio appellate courts routinely sue the "good cause" exception to the ninety day time limit in a manner such that good cause is never found. Because the Court has sustained Petitioner's second claim for relief, and finds that the appropriate remedy is to reinstate his direct appeal, it is unnecessary to reach a decision on Petitioner's other habeas corpus claims.

## IV.

For the foregoing reasons, the Court finds that Petitioner's second claim for relief is meritorious, and should be sustained. The motion for a writ of habeas corpus is thus GRANTED as to Petitioner's second claim for relief, unless within ninety (90) days, the Ohio Court of Appeals reinstates Mr. Carpenter's direct appeal.

/s/JOSEPH P. KINNEARY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Nos. 97-3392/3393

ROBERT W. CARPENTER,
Petitioner-Appellee/Cross-Appellant,

*v.*

GARY C. MOHR, WARDEN,
Respondent-Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 96-00447—Joseph P. Kinneary, District Judge.

Argued: April 28, 1998

Decided and Filed: December 18, 1998

Before: MERRITT, JONES, and NORRIS, Circuit Judges.

NATHANIEL R. JONES, Circuit Judge. Respondent Gary C. Mohr, a warden for the State of Ohio, appeals from the district court's grant of a conditional writ of habeas corpus to petitioner Robert W. Carpenter. The district court held that Carpenter's appellate counsel on direct appeal in state court was ineffective for failing to raise a sufficiency of the evidence claim, and ordered that the state court reinstate Carpenter's appeal within ninety days or a writ of habeas corpus would be issued. Carpenter cross-appeals from the district court's decision not to decide his remaining habeas claims. For the reasons stated herein, we affirm the district court's determination that Carpenter established cause for procedurally defaulting his insufficient evidence claim. However, we remand the case for issuance of a writ of habeas corpus conditioned upon the state court granting Carpenter a new culpability hearing.



## I.

On the evening of October 5, 1988, Warren Young found the dead body of his adoptive mother Thelma Young,[1] a 73-year-old woman, in her Columbus, Ohio home. She had apparently been bludgeoned to death with a blunt object and repeatedly cut and stabbed with a sharp object and a screw driver. All of the cash kept in her purse and bedroom dresser had been removed. The next day, on October 6, 1988, Carpenter, Warren Young's close friend, telephoned 9-1-1 and stated that he had information concerning the crime. He informed the police officers investigating the crime that while he was attending to his car at a gas station, three men forced him at gun point to the rear of his car, and drove the car to Young's home. At Young's home, two men took Carpenter's shirt and glasses. According to Carpenter, the three men then forced Carpenter to knock on the door, and when Young answered pushed Carpenter inside. Carpenter asserted that one of the men went with Carpenter into Young's bedroom where he forced Carpenter to dump the contents of Young's purse on the bed. That man then took the money from Young's purse and forced Carpenter into the bathroom. While Carpenter was in the bathroom, Young was murdered. After the men left, Carpenter exited the bedroom, removed a screw driver from Young's mouth, and rolled Young's body onto its back. He retrieved his glasses and shirt that were lying near the body, picked up the screw driver and left the house. The next day he called 9-1-1.

Although the police initially considered Carpenter a witness, he was eventually arrested. The police retrieved a number of items of evidence connecting Carpenter to the crime scene, including pieces of Carpenter's clothing with blood from the victim, as well as a screw driver found in his car. J.A. at 308. Carpenter, however, consistently maintained that although he was present during the murder, others actually committed the crime.[2]

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[1] All references to "Young" are to Thelma Young.

[2] While in jail prior to his culpability hearing, Carpenter apparently confessed to a state psychiatrist a slightly different version of events. In

On October 14, 1989, a Franklin County Grand Jury returned an indictment charging Carpenter with one count of aggravated murder with a death penalty specification under Ohio Rev. Code § 2903.01, and one count of aggravated robbery under Ohio Rev. Code § 2911.01. Carpenter initially entered a general plea of not guilty to the charges, but as a result of a plea agreement, waived his right to a jury trial and changed his plea to a conditional guilty plea pursuant to the procedure approved in *North Carolina v. Alford*, 400 U.S. 25 (1970), in which he pleaded guilty while still maintaining his innocence. During the culpability hearing concerning his guilty plea, held before a three-judge panel, Carpenter asserted his innocence and stated that he pleaded guilty only to avoid the death penalty. J.A. at 253-55. The prosecution then recited its statements of facts concerning the charges, which the parties agreed that the defense would neither admit nor deny. J.A. at 257. No witnesses were called during the culpability hearing and no testimony or exhibits were admitted other than the prosecution's statement concerning the crime. After hearing the prosecution's statement, the three-judge panel accepted Carpenter's plea and found beyond a reasonable doubt that Carpenter had committed the crimes charged in the indictment, including the death penalty specification that Carpenter was the principal offender and committed the murder during the commission of an aggravated robbery. The three-judge panel then conducted a mitigation hearing to determine Carpenter's sentence and subsequently sentenced Carpenter to a life term of imprisonment with no possibility of parole for thirty years on the aggravated murder count, and to a concurrent term of ten years minimum to twenty-five years maximum on the aggravated robbery count.

On October 9, 1990, Carpenter (through counsel) appealed his convictions and sentence to the Ohio Court of Appeals,

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this version, Carpenter still maintained that he was an unwilling participant when three men forced their way into Young's home and killed her; yet admitted that the men were known to him and that he had voluntarily accompanied the men who he claimed had gone to Young's home in order to retrieve a drug debt that Young's son owed them. Carpenter also admitted to being forced to strike Young with the screw driver after she was already dead. J.A. at 613-17.



assigning only one error.[3] The Court of Appeals affirmed the convictions and sentence, and Carpenter did not appeal this decision to the Ohio Supreme Court.

On March 13, 1992, Carpenter applied for post-conviction relief and filed a pro se petition to vacate or set aside his convictions and sentence asserting four errors.[4] The trial court dismissed the petition on June 18, 1992, finding no substantive grounds for relief. Carpenter then appealed this decision, again pro se, to the Ohio Court of Appeals asserting two errors.[5] After the state's response, Carpenter filed an additional assignment of error pro se.[6] Carpenter then obtained court-appointed counsel and on September 30, 1992, filed another brief asserting one assignment of error.[7] On December 3, 1993, the Ohio Court of Appeals affirmed the lower court decision dismissing Carpenter's petition to vacate, finding that the conclusory statements made in support of his petition were insufficient to state a ground for post-conviction relief. Carpenter (again pro se) appealed to the Ohio Supreme Court which dismissed the appeal on April 14, 1993.

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[3] Carpenter's counsel argued that the evidence offered in mitigation established that the only reasonable sentence was a sentence of life with possibility of parole after twenty years rather than thirty. J.A. at 61-69. He did not challenge the sufficiency of the evidence.

[4] The claims were: (1) ineffective counsel; (2) improper charging of offenses and improper sentences imposed; (3) *Alford* plea obtained illegally by coercion and threats; and (4) constitutional violations. J.A. at 85-86. He also requested production of documents to support his petition.

[5] On that appeal Carpenter argued: (1) the trial court committed reversible error in dismissing his petition to vacate sentence and failing to grant him an evidentiary hearing on his claims; and (2) the trial court erred in not ordering the clerk to convey requested documents to him.

[6] The trial court's refusal to allow him requested documents violated his rights under the Ohio Constitution. J.A. at 113-17.

[7] The trial court erred by summarily dismissing Carpenter's petition for post-conviction relief without affording him an evidentiary hearing to substantiate his grounds for relief.

On July 15, 1994, after retaining yet another counsel, Carpenter filed an application to reopen his direct appeal in the Ohio Court of Appeals pursuant to Ohio R. App. P. 26(B), alleging that his original appellate counsel was ineffective because he had failed to raise the sufficiency of the evidence claim on direct appeal. This was Carpenter's first opportunity to raise the claim of ineffective assistance of appellate counsel because under Ohio law such claims cannot be raised in post-conviction proceedings, but must be raised either in a motion for reconsideration in the court of appeals through an application to reopen direct appeal, or in an appeal to the Ohio Supreme Court. *See State v. Murnahan*, 584 N.E.2d 1204, 1208-09 (Ohio 1992). The Ohio Court of Appeals dismissed Carpenter's application on September 29, 1994, determining that Carpenter had failed to show good cause for filing his application beyond the ninety-day period required under Ohio R. App. P. 26(B)(1).[8] Carpenter subsequently appealed this decision to the Ohio Supreme Court, which on January 31, 1996 affirmed the Ohio Court of Appeals' decision in a one sentence per curiam opinion relying on the authority of *State v. Reddick*, 647 N.E.2d 784 (Ohio 1995).

On May 3, 1996, Carpenter filed a habeas corpus petition with the United States District Court for the Southern District of Ohio. He alleged: 1) insufficiency of the evidence to support his plea and subsequent sentence; 2) ineffective assistance of appellate counsel; and 3) that he was denied a meaningful opportunity to litigate his federal claims in the state

[8] Ohio Appellate Rule 26(B) provides in pertinent part that a defendant may appeal from a judgment of conviction or sentence based on a claim of ineffective assistance of appellate counsel by filing an application to reopen the direct appeal "in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." Ohio R. App. P. 26(B)(1). Rule 26(B) also provides that an application will be granted "if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." Ohio R. App. P. 26(B)(5).

Carpenter's direct appeal was journalized on March 21, 1991, two years before the effective date of this rule, and therefore the court treated the effective date of the rule, July 1, 1993, as the start date for the time requirement. Carpenter filed his application to reopen the direct appeal on July 15, 1994, more than ninety days after the effective date of the rule.



courts through the application of Ohio Appellate Rule 26(B). On March 12, 1997, the district court entered judgment for Carpenter on his ineffective assistance of appellate counsel claim and ordered that a writ of habeas corpus conditionally issue unless the Ohio Court of Appeals reinstated Carpenter's direct appeal from the state conviction within ninety days. The district court did not rule on Carpenter's sufficiency of the evidence and lack of meaningful relief claims, deeming them moot. The State timely appeals from this judgment and Carpenter cross appeals from the district court's denial of relief on his two other grounds, as well as the district court's choice of remedy.

## II.

This court reviews *de novo* a district court's disposition of a petition for a writ of habeas corpus, but nonetheless reviews the district court's factual findings for clear error. *Groseclose v. Bell*, 130 F.3d 1161, 1163 (6th Cir. 1997); *see also West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996); *Warner v. United States*, 975 F.2d 1207, 1217 (6th Cir. 1992).

We first address Carpenter's cross-appeal because the resolution of that appeal in Carpenter's favor would render the State's appeal moot. Carpenter argues that the district court erred on several grounds by failing to reach the merits of his sufficiency of the evidence claim.[9] First, he argues that the district court erroneously applied the four part *Maupin* test for state procedural default.[10] The district court determined

[9] Carpenter also argues that the district court erred in failing to reach the merits of his claim that Ohio Appellate Rule 26(B) precludes a petitioner from the opportunity for meaningful litigation of his or her federal claims in state court. We find that our resolution of Carpenter's sufficiency of the evidence claim renders this claim moot.

[10] Under *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), the Sixth Circuit utilizes a four part analysis when a state argues that a federal habeas claim has been procedurally defaulted in state court. This court determines: 1) whether there is a procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to follow this rule; 2) whether the state courts actually enforced the state procedural rule; 3) whether the state procedural rule is an adequate and independent state ground to foreclose federal relief; and if so 4) the petitioner must establish cause for his failure to follow the rule and prejudice by the alleged constitutional error. *Id.*

initially that Carpenter's sufficiency of the evidence claim was waived for purposes of habeas review because he failed to assert it in state court making it barred there due to res judicata. *See State v. Perry*, 226 N.E.2d 104, 105 (Ohio 1967) (applying res judicata to bar claim of ineffective assistance of counsel in state court); *State v. Sowell*, 598 N.E.2d 136, 140 (Ohio Ct. App. 1991) (same). Neither party contests this ruling. The district court then determined that in order to hear the claim on federal habeas review, it must decide if Carpenter had asserted "cause and prejudice" for the state procedural default. *See, e.g., Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994) ("If a habeas corpus petitioner is barred from presenting one or more of his claims to the state courts because of procedural default, he has waived those claims for purposes of federal habeas corpus review unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error."); *Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996); *see also Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). As "cause" for his failure to raise the sufficiency of evidence claim in state court on direct appeal, Carpenter asserted, as he is permitted to do, the ineffective assistance of his appellate counsel. *See Gravley*, 87 F.3d at 785 ("Attorney error that amounts to ineffective assistance of counsel can constitute 'cause.'"). The district court then determined that because a federal court may not consider ineffective assistance of counsel as cause for a procedural default unless the claim was itself presented to the state court as an independent claim, it was required to first determine whether Carpenter's ineffective assistance of appellate counsel claim had been preserved for habeas corpus review. J.A. at 817. The court next applied the *Maupin* test for procedural default to the ineffective assistance of appellate counsel claim, and determined that this claim had not been waived because the state procedural bar (Ohio R. App. P. 26 (B)) was not an adequate state ground upon which to deny federal habeas relief. Thus, the court determined that the ineffective assistance of Carpenter's appellate counsel could be utilized to establish cause for Carpenter's failure to raise the sufficiency of evidence claim on direct appeal, and after considering the claim, determined that Carpenter's counsel was constitutionally ineffective. The district court, however, declined to decide the sufficiency of the evidence claim, finding that its resolution of



the ineffective assistance of appellate counsel claim, i.e. by ordering the state court to reinstate Carpenter's appeal, rendered the sufficiency of the evidence claim moot.

Carpenter argues that the district court erred initially by determining that the cause for his procedural default of his sufficiency of evidence claim (here ineffective assistance of appellate counsel) must itself be subjected to a procedural default analysis before it may constitute cause. He argues that the Supreme Court's decision in *Murray v. Carrier*, 477 U.S. 478 (1986), only imposed an exhaustion requirement on the cause asserted by the habeas petitioner in connection with the procedural default of the primary habeas claim. We agree.

Carpenter is correct in that the district court erroneously conflated the exhaustion requirement with the procedural default or waiver rule. The two inquiries are analytically distinct. *See Meeks v. Bergen*, 749 F.2d 322, 324 (6th Cir. 1984) (noting that "the question of whether a respondent is barred from litigating in a federal habeas corpus proceeding constitutional claims that were forfeited before the state court is distinct from the issue of exhausted state remedies"); *see also Engle v. Isaac*, 456 U.S. 107, 125-26 n. 28 (1982) (finding that waiver is separate from the question of exhaustion and exhaustion simply requires a petitioner to exhaust those remedies "available in the court of the State"). In *Murray*, the Court held that an ineffective assistance of appellate counsel claim must merely be presented to the state courts as an independent claim, before it can be used to establish cause for the state procedural default of a separate claim. *Murray*, 477 U.S. at 488-89. In so doing, the Court stated:

> [W]e think that the exhaustion doctrine, which is 'principally designed to protect the state courts' role in the enforcement of state judicial proceedings' generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. The question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause -- a question of federal law-- without deciding an independent and unexhausted constitutional

> claim on the merits. But if a petitioner could raise his ineffective assistance claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available. The principle of comity that underlies the exhaustion doctrine would be ill served by a rule that allowed a federal district court 'to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation' and that holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief.

*Id.* (citations omitted). A careful reading of *Murray* makes clear that the Supreme Court was concerned only that a federal court not infringe on a state court's right to decide issues pertaining to the state court conviction first, and thus felt that an exhaustion requirement, one that had not previously been required in reference to the cause element, needed to be implemented.

"Th[is] exhaustion requirement is satisfied when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). Significantly, "[t]o exhaust his or her remedies, a petitioner for federal habeas corpus relief is only required to raise his claims before the state's highest court. The fact that the state court does not address the merits of the claim does not preclude a finding of exhaustion." *Id.* at 883; *see also Rudolph v. Parke*, 856 F.2d 738, 739 (6th Cir. 1988) ("It is settled law in this circuit that a constitutional claim which is presented to the state courts, regardless of whether they address and dispose of it, will satisfy the exhaustion requirement."). Furthermore, exhaustion applies even if a claim was procedurally defaulted in state court, because in such cases there are no longer remedies available for the petitioner to exhaust. *See Gray v. Netherland*, 518 U.S. 152, 161 (1996); *Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *Engle*, 456 U.S. at 125-26 n.28 (1988).



Here, the state expressly conceded that Carpenter exhausted his ineffective assistance of appellate counsel claim. J.A. at 16. Carpenter presented his ineffective assistance of appellate counsel claim in his state court petition to reopen his direct appeal, and thus provided the state court with the first opportunity to determine the claim. When this petition was denied, he then appealed that denial to the Ohio Supreme Court. True, the state court declined to rule on the merits of his ineffective assistance of appellate counsel claim because Carpenter filed the claim late, and according to the state court, without good cause for his delay. Carpenter, however, has exhausted all available state remedies for the claims. While the state court's denial of Carpenter's ineffective assistance of appellate counsel claim on procedural grounds now precludes him from raising the claim as an independent habeas claim, it does not preclude him from asserting the ineffective assistance of appellate counsel as cause for his state court procedural default of his sufficiency of the evidence claim. A petitioner is permitted to assert ineffective assistance of counsel as cause, even if the state court has denied the claim based on a procedural default, so long as the claim was presented to the state courts and it is exhausted. Put another way, the Supreme Court simply requires exhaustion of the ineffective assistance of counsel claim in order for it to constitute cause. The claim must be presented to the state courts, and all available remedies foreclosed, or the exhaustion requirement will not be met. Once all available remedies in state court are precluded and the state court may no longer pass on the claim, however, it is exhausted and may be utilized as cause. There is no additional requirement beyond exhaustion in order for a petitioner to utilize ineffective assistance of appellate counsel as cause for the procedural default of an independent claim. *Cf. Meeks*, 749 F.2d at 325-26 (finding that a petitioner's habeas claims were exhausted when the petitioner joined the claims in an application for delayed appeal in state court, even though the claim was ultimately denied in state court due to a procedural default).

We do note that, although our review of the issue has not found a large number of cases directly addressing the issue, the Second and Seventh Circuits have considered the issue in slightly different contexts. *See, e.g., Reyes v. Keane*, 118 F.3d

136, 139-40 (2d Cir. 1997) (habeas petitioner who fails to raise a claim of ineffective assistance of trial counsel in state court may not present that claim as cause for procedurally defaulted habeas claim); *Lemons v. O'Sullivan*, 54 F.3d 357, 360-61 (7th Cir. 1995) (same). Those cases are distinguishable from the present case, for in both cases the petitioner completely failed to raise the ineffective assistance claim in state court. Here, however, Carpenter raised the claim in the primary avenue available to him under Ohio law (application to reopen his direct appeal). Hence, Carpenter provided the state court with the first opportunity to address the claim, although the court declined to do so on a procedural basis. Therefore, we do not decide whether a petitioner's complete failure to raise an ineffective assistance claim in the state courts would be insufficient under *Murray*. Under a broad reading of *Murray*, we note that it probably would be insufficient, as the Seventh and Second Circuits have held.

Therefore, we conclude that the district court erred by finding that before it could consider whether the ineffective assistance of Carpenter's appellate counsel established cause for the state procedural default of Carpenter's sufficiency of the evidence claim, it must first determine whether the ineffective assistance of appellate counsel claim was itself procedurally defaulted, rather than simply exhausted. Principles of comity do not require placing a procedural default analysis on claims asserted as cause. We believe that the exhaustion requirement mandated by *Murray* is sufficient, and ensures that the state court has the first opportunity to hear such claims. Moreover, as noted earlier, a petitioner will be effectively "punished" for procedurally defaulting the ineffective assistance claim by only being able to assert it as cause for a procedural default and not being permitted to assert it as an independent habeas claim. The Supreme Court in *Murray* did not implement a procedural default requirement for claims asserted as cause, and until it does, we see no reason to engraft such a requirement on our own.

Once shown to be exhausted, the ineffective assistance of appellate counsel could be properly utilized as cause for the default of the sufficiency of the evidence claim, and the court was then required to continue the cause and prejudice analysis



by determining whether the ineffective assistance of appellate counsel rose to the level of a constitutional violation, thereby satisfying the cause element for excusal of state procedural default. *See, e.g., Rust*, 17 F.3d at 161 (noting that attorney error may constitute cause if it constitutes ineffective assistance of counsel under the test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984)); *Ritchie v. Eberhart*, 11 F.3d 587, 591 (6th Cir. 1993). In order for ineffective assistance of appellate counsel to rise to the level of a Sixth Amendment violation, the performance of Carpenter's counsel: 1) must be deficient, in that it is below an objective standard of reasonableness, and 2) this deficient performance must have prejudiced his appeal. *See Bowen v. Foltz*, 763 F.2d 191, 194 (6th Cir. 1985); *cf. also Strickland*, 466 U.S. at 688, 694; *West*, 73 F.3d at 84. A petitioner may establish prejudice by demonstrating that there is a reasonable probability that but for counsel's errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. Carpenter argues, and the district court determined below, that his appellate counsel's failure to raise the sufficiency of the evidence on direct appeal, and only raising the significantly weaker claim that Carpenter was entitled to parole after twenty rather than thirty years, was constitutionally deficient.

Under normal circumstances a plea of guilty precludes the defendant from attacking the sufficiency of the evidence under Ohio law. *See State v. Hertz*, 135 N.E.2d 781 (Ohio Ct. App. 1954)(per curiam). Ohio law, however, requires that a party who pleads guilty to aggravated murder appear before a three-judge panel which must "examine the witnesses, determine whether the accused is guilty of aggravated murder . . . and pronounce sentence accordingly." O.R.C. § 2945.06. Challenges to the sufficiency of the evidence are therefore expressly permitted on aggravated murder charges. *See State v. Taylor*, 285 N.E.2d 89, 96 (Ohio Ct. App. 1972); *see also State v. Leasure*, No. 1755, 1992 WL 174663 (Ohio Ct. App. July 22, 1992) (challenging the sufficiency of the evidence after guilty plea). In addition, the Ohio Supreme Court has recently affirmed that a guilty plea conviction supported only by the prosecution's recitation of the facts "does not satisfy the evidence requirements of Crim. R. 11 and R.C. 2945.06." *State v. Green*, 689 N.E.2d 556, 559 (Ohio 1998). In *Green*, a

unanimous court held that during a culpability hearing on a guilty plea, the three-judge panel must examine witnesses, and in that case found that because Green's conviction was not supported by any evidence other than the prosecution's factual recitation, it must be reversed and remanded for a new trial. *Id.* at 559-60.

As an additional point, we note that although *Green* was decided after Carpenter raised his claims in state court, application of the rule pronounced in *Green* to this case does not present a retroactivity problem under *Teague v. Lane*, 489 U.S. 288, 301 (1989). The Ohio Supreme Court's decision in *Green* does not constitute a "new rule," nor does it create a new constitutional right as contemplated by *Teague*. Indeed, *Green* relies upon the plain language of O.R.C. § 2945.06, which has been in effect since 1991, and the Ohio Supreme Court's decision in *State v. Post*, 513 N.E.2d 754, 756 (Ohio 1987). Moreover, *Green* specifically notes the "inherent dangers" in relying solely on the prosecutor's recitation of the facts considering the well-settled principle that "a statement of facts by a prosecutor does not constitute evidence." *Green*, 689 N.E.2d at 559 (citing *State v. Davis*, 581 N.E.2d 1362, 1373 (Ohio 1991)). Finally, although *Green* was a state law ruling, it certainly has constitutional import, for due process requires that a state criminal conviction be supported by sufficient and adequate evidence on the elements of the offense. *See Jackson v. Virginia*, 443 U.S. 307, 323-24 (1979). Consequently, application of the standards most recently articulated in *Green* neither "breaks new ground [nor] imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301.

The district court in the case *sub judice* noted that a reasonably knowledgeable criminal defense attorney would have known that the sufficiency of the evidence could be challenged following a guilty plea to aggravated murder, and that the specific facts of Carpenter's case warranted a sufficiency of the evidence challenge on appeal. We agree. First, since *Taylor* in 1972, it has been well-established law in Ohio that the sufficiency of the evidence may be challenged on the appeal of an aggravated murder conviction. Second, Carpenter never wavered from his protestations of innocence,



only entering a conditional guilty plea, and only in order to avoid the death penalty. Finally, the only information before the panel was the prosecution's recitation of the facts, which as noted previously is not evidence. *See Green*, 689 N.E.2d at 559; *Davis*, 581 N.E.2d at 1373. Here, no witnesses were called as required by Ohio Rev. Code § 2945.06, and no independent evidence was submitted. Carpenter's case mirrors that of *Green* where guilt was established only through the prosecution's recitation of the facts, and the conviction was reversed on appeal.[11] Therefore, the facts of Carpenter's case clearly supported a sufficiency of the evidence challenge and it is unfathomable why Carpenter's counsel failed to raise a sufficiency of the evidence claim on appeal. We find that his complete failure to raise such an integral part of Carpenter's case and his raising of a significantly weaker claim, illustrates that his counsel was constitutionally ineffective. *See, e.g., Reed v. Ross*, 468 U.S. 1, 13-14 (1984) (noting that although tactical decisions do not make out a claim for ineffective assistance, the failure to raise a significant constitutional claim may); *Clemmons v. Delo*, 124 F.3d 944, 953-54 (8th Cir. 1997) (finding ineffective assistance of appellate counsel where appellate counsel failed to raise obvious claim on direct appeal); *Banks v. Reynolds*, 54 F.3d 1508, 1515 (10th Cir. 1995) (failure to raise "dead bang winner" claim on appeal was constitutionally ineffective assistance of appellate counsel even though other strong claims were raised); *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) (noting that petitioner may establish ineffective assistance of appellate counsel if he shows that counsel ignored significant obvious issue while pursuing weaker claims); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) (finding ineffective assistance of appellate

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[11] A prosecution's recitation of the facts may be considered evidence with the explicit consent of the defense. *See Post*, 513 N.E.2d at 766. The Ohio Court of Appeals on Carpenter's application to reopen his direct appeal seemed to imply that his counsel's decision to neither admit nor deny these facts was such explicit consent, but did not rely on that basis for denying Carpenter's application. J.A. at 186-87. In light of the fact that defense counsel in *Green* had made no such stipulation, the Ohio Supreme Court expressly declined to reconsider *Post*. *Green*, 689 N.E.2d at 559. Neither party in this case thoroughly briefed the issue on appeal, and the district court did not address it below. Upon remand, the district court may rule on the issue.

counsel when counsel failed to raise substantial claim but instead raised weaker one); *Matire v. Wainright*, 811 F.2d 1430, 1438 (11th Cir. 1987) (same). Thus, Carpenter has asserted sufficient cause for his failure to raise the sufficiency of the evidence on direct appeal and because, as noted, the claim is clearly a viable one, he has also established prejudice from his counsel's failure to raise the claim.[12] Accordingly, the ineffective assistance of Carpenter's appellate counsel excused his failure to raise the sufficiency of the evidence claim on direct appeal in state court.[13] *Cf. Gravley*, 87 F.3d at 786.

Upon establishing that Carpenter had sufficiently asserted cause for procedural default of his insufficiency of the evidence claim, the district court determined that the appropriate remedy would be to issue the writ conditioned upon the state court reinstating Carpenter's direct appeal. We agree that a conditional writ is the appropriate remedy in this case. We conclude, however, that because the state court has already made its position concerning Carpenter's appeal relatively

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[12] Although we find that Carpenter has established prejudice from the failure to raise the sufficiency of the evidence on appeal, in that there is a reasonable probability that the result of the proceedings may have been different, we do not decide the claim here.

[13] Although reaching the same conclusion as this court, that ineffective assistance of appellate counsel excused Carpenter's failure to raise the sufficiency of the evidence claim in state court, the district court's analysis was different. The district court found below that the ineffective assistance of counsel claim may constitute cause for the state procedural default of the sufficiency of the evidence claim, even though it too had been procedurally defaulted in state court, because the state court rule utilized as a basis for barring the ineffective assistance of appellate counsel claim, Ohio R. App. P. 26(B), was not an adequate and independent state ground to foreclose relief. The district court found that the good cause requirement of the rule had been inconsistently applied in the state courts. While we agree that it appears that the good cause requirement has not been uniformly applied in state court, we need not reach the issue because of our ruling that in determining whether the ineffective assistance of appellate counsel could constitute cause for the default of the sufficiency of the evidence claim, the district court was not required to determine whether it was procedurally defaulted, but merely whether it had been exhausted. Our analysis of whether the ineffective assistance of appellate counsel claim rose to the level of a constitutional violation, however, follows that of the district court below.



clear, ordering the state court to reinstate the direct appeal would simply prolong resolution of this case. If and when the state court denied the appeal, Carpenter would simply file a successive habeas petition reasserting his claims and again requesting federal review. Considering that Carpenter's initial complaint was that his culpability hearing went awry, we find that the more appropriate resolution here is for the district court to issue the writ of habeas corpus conditioned upon the state court granting Carpenter a new culpability hearing in accordance with state and federal law.

## III.

For the foregoing reasons, we **AFFIRM** the district court's judgment that the ineffective assistance of Carpenter's appellate counsel constituted cause for the procedural default of his insufficiency of the evidence claim, but **REMAND** the case to the district court for the imposition of a remedy consistent with this opinion. Our resolution of the cross-appeal in Carpenter's favor renders moot the State's direct appeal of the district court's grant of a conditional writ of habeas corpus to Carpenter.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Nos. 97-3392/3393

ROBERT W. CARPENTER,
Petitioner-Appellee/Cross-Appellant,

*v.*

GARY C. MOHR, WARDEN,
Respondent-Appellant/Cross-Appellee.

[Filed: March 24, 1999]

Before: MERRITT, JONES, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk



No. 98-2060

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**IN THE SUPREME COURT OF THE UNITED STATES**

RONALD D. EDWARDS, WARDEN,
*Petitioner,*

v.

ROBERT W. CARPENTER,
*Respondent.*

[Filed: November 8, 1999]

**ORDER ALLOWING CERTIORARI**

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted.

November 8, 1999